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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12

13 JOSE GOMEZ, individually and on
behalf of a class of similarly situated
14 individuals,

15 Plaintiff,

16 v.

17 CAMPBELL-EWALD COMPANY, a
Delaware corporation,

18 Defendant.
19

Case No. CV 10-2007-DMG (CWx)

Assigned to Hon. Dolly M. Gee

**SEPARATE STATEMENT OF
UNCONTROVERTED FACTS
AND CONCLUSIONS OF LAW IN
SUPPORT OF DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

Date: December 9, 2011

Time: 3:00 p.m.

Ctrm: 7 (Spring Street)
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Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Central District Local Rule 56-1, defendant Campbell-Ewald Company (“C-E”) submits this Separate Statement of Uncontroverted Facts and Conclusions of Law in support of its concurrently filed Motion for Summary Judgment.

UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
1. C-E is a global advertising agency that provides marketing services to clients throughout the United States, including the United States Navy.	Declaration of Daniel Rioux (“Rioux Decl.”) ¶ 1.
2. C-E is the Navy’s advertising agent of record.	Declaration of Lee Buchschacher (“Buchschacher Decl.”) ¶ 3.
3. Beginning in 2000, C-E contracted with the Navy to assist the Navy in achieving its recruitment goals.	Buchschacher Decl. ¶¶ 2-3; Rioux Decl. ¶ 3.
4. Recruiting is an important mission of the United States Navy.	Reilly Decl. Exs. 1-4, 6; Buchschacher Decl. ¶¶ 2-3, Ex. 1.
5. Marketing plays a significant role in the Navy’s recruitment efforts.	Buchschacher Decl. ¶ 3.
6. Navy Recruiting Command (“NRC”) is the recruiting arm of the Navy that is devoted solely to Naval recruitment efforts.	Buchschacher Decl. ¶ 2.
7. In September 2005, NRC and C-E executed a fee-based contract for advertising and media to support the Navy’s recruitment efforts in 2006.	Rioux Decl. ¶ 4, Ex. 1.

UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
<p>8. The contract provided various media outlets “consisting of, but not limited to, television, radio, internet, etc. to increase Navy’s share of voice, promote Navy brand awareness, and support recruiting efforts.”</p>	<p>Rioux Decl. Ex. 1 at 3.</p>
<p>9. On January 4, 2006, the contract was amended to provide additional services and a larger budget pursuant to a revised media plan approved by NRC.</p>	<p>Rioux Decl. ¶ 5 Exs. 2-4.</p>
<p>10. A small component of this revised plan consisted of “wireless/mobile marketing.”</p>	<p>Rioux Decl. ¶ 5 Ex. 4.</p>
<p>11. Given its young target audience, it is important to the Navy’s recruiting goals to engage in exploratory or emerging media and to be at the forefront of new and innovative media forms, including media made possible through technological advancements.</p>	<p>Buchschacher Decl. ¶ 7; Rioux Decl. ¶ 6.</p>
<p>12. NRC shared this vision and objective with C-E and authorized funds specifically for the purpose of exploring new media opportunities, including text messaging, which was an emerging form of media in or about 2005.</p>	<p>Buchschacher Decl. ¶ 7, Ex. 2 at 15; Rioux Decl. ¶ 6, Ex. 3 at 2, 4.</p>

UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
13. In December 2005, C-E presented NRC with a communications plan providing recommendations for media programs.	Buchscher Decl. ¶ 6, Ex. 2.
14. Among the various media was “Exploratory Media,” which included an option for “Wireless/Mobile Marketing” to “Expand on Navy’s Direct Response efforts via SMS [text messaging] and WAP [wireless application protocol].”	Buchscher Decl. Ex. 2 at 15.
15. Fleet Industrial Supply Center (FISC), the Navy’s contracting administrator, and NRC approved the wireless/mobile marketing option for 2006.	Buchscher Decl. ¶ 6.
16. Pursuant to the 2006 contract, in February 2006, C-E issued a request for proposal for “executing wireless advertising from April-June, 2006 on behalf of [its] client, the United States Navy.”	Rioux Decl. ¶ 7, Ex. 5.
17. In response to C-E’s request for proposals, MindMatics LLC submitted proposals in February 2006 and April 2006.	Rioux Decl. ¶ 8, Exs. 6-7.

UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
<p>18. MindMatics recommended a “direct mobile marketing push program” for the Navy “to deliver to a mobile phone a marketing message via SMS text messaging.”</p>	<p>Rioux Decl. Ex. 6 at 3, Ex. 7 at 3.</p>
<p>19. On or about March 17, 2006, C-E presented a powerpoint presentation to NRC entitled “Navy 2006 Wireless/Mobile Tactical Media Recommendations,” which outlined “Exploratory Media” options consistent with the Navy’s goals, including MindMatics’ text messaging proposal.</p>	<p>Rioux Decl. ¶ 10 Ex. 8; Buchschacher Decl. ¶ 8 Ex. 3.</p>
<p>20. Because it was the Navy’s message and branded with the Navy’s name, C-E was required to “gain [NRC] approval to proceed” and to “gain final Navy approvals on creative executions.”</p>	<p>Buchschacher Decl. ¶ 9 Ex. 3 at 19; Rioux Decl. ¶ 11 Ex. 8 at 19.</p>
<p>21. C-E obtained approvals from the Navy for both the media buy (i.e, the campaign strategy) and the text message copy.</p>	<p>Buchschacher Decl. ¶¶ 11-12 Exs. 4-5; Rioux Decl. ¶ 12, Ex. 9.</p>
<p>22. The Navy authorized MindMatics’ proposed text message campaign and revised the copy before approving the text message.</p>	<p>Buchschacher Decl. ¶¶ 11-12, Exs. 4-5; Rioux Decl. ¶ 12, Ex. 9.</p>

UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
<p>23. The Navy approved the following message to potential Naval recruits:</p> <p>Destined for something big? Do it in the Navy. Get a career. An education. And a chance to serve a greater cause. For a FREE Navy video call 1-800-510-2074.</p>	<p>Buchschacher Decl. ¶ 12, Ex. 5; Rioux Decl. ¶ 12, Ex. 9.</p>
<p>24. Between May 10 and May 24, 2006, text messages were sent by MindMatics to potential Naval recruits between the ages of 18 and 24, the Navy's target recruiting audience.</p>	<p>Rioux Decl. ¶ 13; Buchschacher Decl. ¶ 10.</p>
<p>25. NRC worked closely with C-E on this campaign and provided Navy oversight and approval.</p>	<p>Buchschacher Decl. ¶ 11.</p>
<p>26. C-E did not send the text messages for the Navy campaign. It did not dial the numbers or operate or maintain control over any automated dialing equipment that placed the calls. It did not have the capability or technology to do so.</p>	<p>Rioux Decl. ¶ 13.</p>
<p>27. MindMatics handled the deployment, transmission and delivery of the text messages on the Navy's behalf using its SMS short code.</p>	<p>Rioux Decl. ¶ 13, Ex. 10; Buchschacher Decl. ¶ 13; <i>see also</i> Compl. ¶¶ 9, 16-17.</p>

UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
28. Gomez received a text message from SMS shortcode 43704 on May 10, 2006.	Reilly Decl. Ex. 5 [Gomez Depo. Tr. 35:10-21, Ex. 1 thereto]; <i>see also</i> Compl. ¶¶ 15-16.
29. The text message that Gomez received from SMS shortcode 43704 was sent on behalf of the United States Navy.	Rioux Decl. ¶ 14; Buchschacher Decl. ¶ 14; Compl ¶ 14..

Dated: October 18, 2011

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